THE IOWA INDIAN CHILD WELFARE ACT

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I. INTRODUCTION

In 1978 the United States Congress passed the Indian Child Welfare Act (ICWA), Public Law 95-608, which is codified at 25 U.S.C. §§ 1901–1963. The ICWA itself contained findings that identified the need for action. Congress found that states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." As a result of this failure, "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." In fact, in the hearings on the issue it was established that approximately 25–35% of all Indian children were removed from their homes and placed in adoptive homes, foster homes, or institutions, which was five times the rate for non-Indian children. As a consequence, the ICWA special protections apply only to Indian children. The United States Supreme Court has held that because the federal-tribal relationship is politically and not racially based, Congress can enact special laws for Native Americans without running afoul of traditional equal protection rules requiring racial or ethnic groups to be similarly treated.

The ICWA declares federal policy to be twofold: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." The ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes . . . ," thereby permitting states to expand on the protections established under the Act. In fact, the ICWA contains specific language directing courts to apply any state or federal law that provides greater protection than the ICWA to an Indian child's parents or an Indian custodian. The Bureau of Indian Affairs (BIA) has established guidelines for the implementation and interpretation of the ICWA, but these guidelines are not published as regulations and, therefore, are not binding.

In 2003, the Iowa Legislature adopted a law very similar to the ICWA, which is codified in chapter 232B of the Iowa Code. The Iowa Act, like its federal counterpart, states a two-fold commitment: "protecting the essential tribal relations and best interest of an Indian child . . . ." The stated purpose of the Iowa statute is "to clarify state policies and procedures regarding implementation of the federal Indian Child Welfare Act . . . ." The Iowa Act provides that both the Federal Act and the Iowa Act apply "without exception" to any "child custody proceeding involving an Indian child" as defined by the Iowa Act.

In many ways, the Iowa Act and the Federal Act parallel each other. For example, the Iowa Act codifies the BIA Guidelines and some of the court decisions that have recited the Federal Act. In other areas, however, the Iowa Act alters some judicial interpretations of the Federal Act, which do not follow the BIA Guidelines. This Article is not intended to be a complete discussion of the Federal or the Iowa Act. It is, however, intended to assist in providing a basic understanding both acts as well as pointing out the important differences between the Federal Act, as implemented and interpreted, and the Iowa Act.

II. THE APPLICABILITY OF THE ACT

Generally, there is a two-prong test to determine if the ICWA applies: (1) the proceeding must be a "child custody proceeding"; and (2) the child involved must be an "Indian child."

A. *Type of Proceeding.*

Both the Federal and Iowa Acts include the following in the definition of "child custody proceeding": foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. Both the Federal Act and the Iowa Act exclude application of the ICWA for delinquency cases and for divorce cases. An interesting difference between the Federal and Iowa Acts is that the Iowa Act clearly states that a child custody proceeding includes both voluntary and involuntary proceedings. Under the Federal Act, both voluntary and involuntary proceedings are covered, although different sections of the Federal Act often apply to each. The Federal Act contains more provisions relating to involuntary proceedings because Congress concluded that involuntary proceedings contained a greater risk of culturally inappropriate removals and placements. As it pertains to foster care placements, the Federal Act has some provisions that only apply to voluntary placements, others that only apply to involuntary placements, and some that apply to both. As it pertains to the termination of parental rights, both voluntary and involuntary proceedings are included in the Federal Act. Regarding adoption cases, the Federal Act allows parental consent to be withdrawn at any time prior to the entry of a final decree and creates placement preferences for adoption that favor adoption of an Indian child by an Indian family.

The Iowa Supreme Court addressed the difference between the Federal and the State acts relative to a voluntary termination/adoption proceeding in**:** *In Re N.N.E.*, 752 N.W. 2d 1 (Iowa 2008). In that case, the Supreme Court explained that the Iowa Indian Child Welfare Act (Iowa ICWA) differs from the federal ICWA in one important manner:

> However, a parent's request is not sufficient to deviate from the preferred placements under the Iowa ICWA. Iowa Code section 232B.9(1) . . .

The Iowa Supreme Court held that this situation violated the parent's due process rights:

> We find such a high burden to deviate from the placement preferences in a voluntary termination violates substantive due process. Parents' interest in their children's care, custody, and control is " 'perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].' " *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 56 (2000)). This court has recognized a fundamental right to parent under the Iowa Constitution.

The Iowa Supreme Court explained the rationale for its ruling as follows:

> A woman in her position has three choices: to keep the child, put the child up for adoption, or terminate the pregnancy. Such a decision is undoubtedly gut wrenching and will forever impact her as well as the unborn child. The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child. Moreover, we do not believe the federal ICWA condones state law curtailing a parent's rights in this manner.

B. *Status of the Child.*

The second prong of the test to determine the applicability of the ICWA is to determine if the child involved is an "Indian Child." Both the Federal Act and the Iowa Act define "Indian Child" as a child that is unmarried, under the age of eighteen, and either a member of a recognized tribe or eligible for such membership. As of 2003, there were over 550 federally recognized Indian tribes in the United States. The Federal Act requires that, if the qualification is based upon eligibility for membership to a recognized tribe, the child must also be the biological child of a member of a tribe. No such requirement exists under the Iowa Act. The Federal Act limits a child's eligibility to only one tribe—the tribe with the most significant contacts with the child will be considered; the Iowa Act, on the other hand, does not limit eligibility to only one tribe. The applicability of the ICWA is not waived simply because the child has not been raised in an Indian culture. *In re R.E.K.F.*, 698 N.W.2d 147, 151 (Iowa 2005).

In addition, the Iowa Act also allows a child who is not a member of a recognized tribe or eligible for such membership to be included if the child is one that "an Indian tribe identifies as a child of the tribe's community." However, in *In re A.W.*, 741 N.W.2d 793 (Iowa 2007) the Iowa Supreme Court faced a constitutional challenge to the way that "Indian Child" is defined in the Iowa Indian Child Welfare Act (Iowa ICWA). The Iowa Supreme Court clearly identified the

way that the state statute differed from the federal act in defining an "Indian Child" under the act:

> One instance in which the Iowa ICWA purports to expand upon the protections afforded by the federal ICWA is in the definition of "Indian child." As we have already noted, the federal ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The Iowa ICWA defines an "Indian child" as "an unmarried Indian person who is under eighteen years of age or a child who is under eighteen years of age that *an Indian tribe identifies as a child of the tribe's community*." Iowa Code § 232B.3(6) (emphasis added). Thus, unlike the federal statute, section 232B.3(6) purports to include within the definition of "Indian child" children without regard to whether they are members of a tribe nor eligible for membership.

The Iowa Supreme Court found that Iowa's expansion of the definition of "Indian child" violates both the Federal and State constitutions as applied to this case:

> Section 232B.3(6) expands the definition of "Indian child" far beyond its federal ICWA counterpart. By including children who are ineligible for tribal membership, section 232B.3(6) clearly exceeds the limits of federal power over Indian affairs upon which the federal ICWA is based and from which the Iowa ICWA is derived. In its classification of ethnic Indian children with tribal Indian children, section 232B.3(6) provides "hardly more than a pretense that this classification is political, rather than racial." *[citations omitted]* We conclude the race-based classification of A.W. and S.W. as "Indian children" is not justified by a compelling state interest. Accordingly, section 232B.3(6), as applied in this case to A.W. and S.W., violates the Equal Protection Clause of the United States Constitution. As a separate and independent ground for our decision . . . we further conclude section 232B.3(6), as applied in this case, violates the equality provision in article I, section 6 of the Iowa Constitution.

Later, the Iowa Court of Appeals, in *In re A.P. and S.T.*, (Iowa Court of Appeals, December 17, 2008), expanded the *A.W.* case to apply it not only on a case-by-case basis, but finding that this provision of the Iowa ICWA is unconstitutional on its face. In this case, the Sac and Fox Tribe of the Mississippi in Iowa appealed a trial court's denial of its motion to intervene on the grounds that the children in question were not "Indian Children" as defined by the Iowa Indian Child Welfare Act (ICWA). The tribe argued that the Iowa Supreme Court Decision in *In re A.W.*, 741 N.W.2d 793 (Iowa 2007) did not declare the expanded definition of "Indian Child" in

the Iowa ICWA unconstitutional on its face, but required a case-by-case analysis. The Iowa Court of Appeals disagreed with the Tribe:

> After its decision in *A.W.*, the Iowa Supreme Court has twice summarized its holding in *A.W.* in other cases concerning the Federal and Iowa ICWA. In *N.V.*, the court explained in a footnote that in *A.W.*, it "held section 232B.3(6) to be unconstitutional as applied to children who were not members of a tribe or eligible for membership in a tribe." *N.V.*, 744 N.W.2d at 635 n.1. Furthermore, in *N.N.E.*, after setting forth the definition of "Indian child" as delineated in the Federal ICWA, the court noted in an explanatory parenthetical that in *A.W.* it held the "Iowa ICWA"s definition of "Indian child" found in Iowa Code [section] 232B.3(6) was unconstitutional because it included ethnic Indians who were not eligible for tribal membership." *N.N.E.*, 752 N.W.2d at 7. Given the court's use of the Federal ICWA"s definition of "Indian child" in *N.N.E.* instead of the Iowa ICWA"s definition, its descriptions of its holding in *A.W.*, and its overall reasoning in *A.W.*, we conclude the Iowa Supreme Court in *A.W.* determined section 232B.3(6) was unconstitutional on its face.

The Federal Act does not, on its face, indicate how tribal membership or eligibility for membership is determined. However, the United States Supreme Court has indicated that the determination of whether a person is an Indian is a question of political status and not race. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). The Court has also indicated that tribal membership is an exclusively tribal question. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). The BIA Guidelines indicate that the determination that a child is an Indian child is conclusive. The Iowa Act mirrors the BIA Guidelines by clearly stating that the written determination by a tribe as to the membership or eligibility for membership, or the testimony of a person authorized by the tribe to make such a determination, is conclusive. If a tribe does not provide evidence of the child's status, the Iowa Act requires the court to determine the child's status. The Iowa Act provides that this determination "shall be made as soon as practicable." The Iowa Supreme Court has ruled that "[w]hether or not a child is an Indian child is, [in the first instance], a question for the tribe" and that the juvenile court can only determine the matter itself "if the Indian tribe does not provide evidence of the child's status." *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005).

The Iowa Act sets forth specific circumstances which would indicate that "the court or any party to the proceeding shall be deemed to know or have reason to know that an Indian child is involved." These circumstances include the following: (1) the court or any party has been informed that the child is or may be an Indian child; (2) the child gives the court some reason to believe that he or she may be an Indian child; and (3) there is "reason to believe the residence or domicile of the child is in a predominantly Indian community." These are essentially the same

criteria that are set forth under the BIA Guidelines to determine if the child may be an Indian child.

Prior to the passage of the Iowa Act, some Iowa courts had been rather reluctant to impose a duty on the courts to inquire if there was a minimal indication of Indian heritage. Prior to the passage of the Iowa Act, the Iowa Court of Appeals in *In re M.N.W.,* 577 N.W.2d 874 (Iowa Ct. App. 1998) required more than is currently required by statute to trigger the notice provisions. In that case, a mother's attorney questioned a Department of Human Services worker about the youngest child's heritage because of the following: (1) the home study indicated that the maternal grandmother identified the child's father as "'Native American, Mexican, and Filipino'"; and (2) the child's name was "Phoenix Blue Skye." The Iowa court clearly placed the burden on the person claiming Indian status: "Some evidence must establish the child is Indian. It does not therefore suffice that the child *may* have a Native American heritage." The Iowa court disregarded the mention of Indian status by the maternal grandmother with the following:

> No information was ever given by either Christie or David that would alert the court or the Department of Human Services that David may be part Native American. The only piece of information came in a preadoptive home study conducted regarding the suitability of Christie's mother as an adoptive parent for Phoenix. In one of her interviews she stated Christie had told her that David was part Native American. This information was not even provided by David who would be in the best position to verify or refute the possibility. It remains unsubstantiated. The evidence in this record is scant at best and does not meet the foregoing statutory criteria to any degree of certainty.

The court similarly dismissed the claim that the name "Phoenix Blue Skye" should trigger the applicability of the ICWA by stating that "[w]hile it is true a person's name may reflect heritage, we cannot assume names are necessarily indicators of heritage, given the multitude of possible explanations behind namegiving in our society. Our courts would be asked to use their creative rather than legal judgment to make such precautionary inquiries." The Iowa ICWA now makes much of this appellate decision inapplicable. The Act clearly establishes that the party seeking placement or termination, not the parent, has an affirmative duty to act to determine if the child is an Indian child. Also, the statement in an adoption study about the possibility of the child having Indian status is enough to trigger application of the Act.

In *In re: Z.H.*, 740 N.W.2d 648 (Iowa App. 2007), the father raised failure to comply with the notice provisions of the Iowa Indian Child Welfare Act (ICWA). In this case, the father made only vague references to a claim of Native American Heritage. The Iowa Court of Appeals agreed with the trial court in holding that such vague statements to not rise to the level to warrant notification to tribes:

> Although our supreme court has indicated "it is better to err on the side of giving notice to the tribe and examining thoroughly whether the child is an Indian child," *[citation omitted]*, common sense supports the district court's decision not to go forward with the notice provisions in this case. The threshold of giving notice under the statute is low, but it is not without limits. . . . Where, however, there are merely vague assertions of possible Native American ancestry, there exists no "reason to believe" and such vague assertions are insufficient to trigger the notice requirements in either act. *[citation omitted]* Anthony's vague statement about his Native American heritage was not injected into this proceeding until the eve of termination, after the statutory time period for termination had elapsed and after he had previously denied having a Native American ancestry. When the court questioned Anthony about his heritage, he was unable to clearly identify the names of relatives with Native American ancestry or identify any tribal affiliation. Recognizing Anthony's mental health issues, the court gave Anthony and his attorney additional time to provide more specific information about his Native American ancestry. Both were unable to do so and neither asked the court for more time to gather this information. We find the court did not err when it found the federal and Iowa ICWA inapplicable and went forward with the termination proceedings. The court correctly considered the unique circumstances surrounding Anthony's claim of Native American ancestry when it decided whether Zachary could possibly be an Indian child. Anthony's previous denial of his Native American ancestry, the timing of his new claim, and his inability to provide the court with any specific information as to why he now believed he was of Native American ancestry did not give the court reason to believe Zachary was an Indian child. Accordingly, the juvenile court was not required to delay termination proceedings in order to comply with the procedural notice requirements of either act.

The Iowa Court of Appeals has ruled on the issue of the determination of Indian status for a child on several occasions since the passage of the Iowa Act. In *In re D.H.*, 688 N.W.2d 491, 493 (Iowa Ct. App. 2004), the Iowa Court of Appeals stated that, with respect to the Iowa Act, it would "assume without deciding that the challenge may be raised for the first time on appeal." The court found that the duty to inquire into the membership status of the child is triggered by the provisions in the Iowa Act, which indicates the situations in which the court or party is deemed to have knowledge that an Indian child is involved. The court noted that it was "not convinced this provision creates a broad duty to inquire of every child's status as an 'Indian child' in every proceeding that may theoretically be covered by chapter 232B." In a separate

opinion, Chief Judge Sackett indicated that the "better practice" would be for the State to allege in its petition that basic inquiries have been made and whether there is evidence that the child qualifies under the Iowa Act. Presumably, such pleading could be used to trigger a judicial determination of membership status in the event the tribe does not provide any statement as to its determination on the issue.

III. THE NOTICE REQUIREMENT.

Both the Federal and Iowa Act have specific notice requirements. Under the Federal Act, notice requirements are triggered "[i]n any involuntary proceeding . . . where the court knows or has reason to know that an Indian child is involved . . . ." The Federal Act does not require notice in voluntary cases. The Iowa Act, however, requires notice in both voluntary and involuntary cases. However, based upon the ruling of *In re N.N.E.*, 752 N.W. 2d 1 (Iowa 2008), it is questionable whether or not this difference from the federal act would be upheld by the Iowa Supreme Court if challenged.

Under both the Federal Act and the Iowa Act, the party initiating the action has the obligation to send notice of the action by registered mail with return receipt requested to the parents, Indian custodians, and the tribe. If the location or identity of persons or groups entitled to notice cannot be determined, the notice must be served on the Secretary of the Interior, who has fifteen days after receipt of the notice to serve the undetermined parties. Service on the Secretary of the Interior is insufficient if the identity or location of the tribe can be determined. Post-notice timelines for proceeding are the same between the two Acts: both require that the proceeding not be held until at least ten days after receipt of the notice and both give the child's parent, Indian custodian, or tribe a right to request an additional twenty-day delay. The Iowa Act also requires that the child's tribe be served notice within three business days after an emergency removal.

The Federal Act only requires that the notice inform of the pending proceedings and of the right to intervention. Although the Federal Act does not indicate any other specific information that must be included in the notice, the BIA Guidelines contain a very specific list of requirements. The Iowa Act specifically designates the required contents of the notice, which basically mirror the BIA Guidelines [*See* IOWA CODE § 232B.5(7), (9).]. The Federal Act does not clearly state whether the notice requirements must be met for every hearing or whether compliance for the "proceeding" is sufficient. However, under the Iowa Act, every proceeding, "including review hearings," triggers new notice requirements.

The BIA Guidelines indicate that, under the Federal Act, notice must be provided at any time that the court discovers that the ICWA applies, even if the proceeding has already started. The Iowa courts take this requirement seriously: one unpublished Iowa Court of Appeals decision

reversed the trial court when, in the midst of the proceedings and after a party changed the claim of tribal membership from earlier assertions, the judge failed to follow the formal notice requirements. In another recent unpublished Iowa Court of Appeals decision, Chief Judge Sackett stated that "[w]hether this statute also puts these requirements on an appellate court when it is the first to be advised there may be a question of the child's eligibility is not clear." The Iowa Supreme Court ruled that notice must be given even if doubts remain about whether the child is an Indian child because "it is better to err on the side of giving notice to the tribe." *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005).

It has long been held that the provisions of the Federal Act are strictly construed and applied. Even before the Iowa Act was passed, the Iowa courts held that compliance with the "[Federal] Act is jurisdictional and failure to give adequate notice to the tribes divests a state court of jurisdiction." *In re J.W.*, 498 N.W.2d 417, 419 (Iowa Ct. App. 1993). Since the passage of the Iowa Act, the Iowa Supreme Court has reiterated that it is "to be strictly construed and applied." *In re R.E.K.F.*, 698 N.W.2d at 149 (citing *In re J.W.*, 498 N.W.2d at 421). If the child is eligible for membership in more than one tribe, notice must be given to all tribes. *In re J.W.*, 498 N.W.2d 422, 419 (Iowa Ct. App. 1993). One unreported Iowa Court of Appeals decision has detailed the level of strict compliance with notice requirements required by the Iowa Act. In that decision, the mother claimed she was a descendent of the Cherokee Nation. Notice was provided and the Cherokee Nation indicated that the children would not be considered "Indian Children." At the beginning of a subsequent termination hearing, the trial judge was notified that the mother then claimed involvement with the Comanche Tribe. The trial judge contacted the ICWA specialist for the Comanche Tribe by phone and proceeded with the hearing until he was contacted by the ICWA specialist indicating that the Comanche Tribe did not consider the children to be "Indian Children." The Iowa Court of Appeals stated that "[w]hile the method employed by the juvenile court at the termination hearing to determine the children's status at first blush seems reasonable, it falls short of the rigorous mandates of notice under the Federal and Iowa ICWA."

In *In re R.E.K.F.*, 698 N.W.2d 147, 148 (Iowa 2005), a father indicated in a termination of parental rights proceeding that he had some connection with the Seneca Tribe of New York. The State provided notice to the Seneca-Cayuga Tribe, which had a mailing address in Miami, Oklahoma. The tribe indicated that the father and child were not members of the tribe. On appeal, the father complained that the State gave notice to the wrong tribe. The Iowa Supreme Court ruled that "[t]he State notified the wrong tribe, and therefore the court did not ensure compliance with the Iowa ICWA."

If notice is not given to a tribe when a child has been identified as potentially being an Indian child, the appellate court must determine the appropriate remedy. If the State fails to meet the notice requirements of the Iowa Act, the termination order is not automatically reverted because there was no determination as to whether the child is an Indian child. The Iowa Supreme Court,

in *In re R.E.K.F.*, 698 N.W.2d 147, 150 (Iowa 2005), specified the proper remedy for failure to provide the necessary notice as follows:

> Rather, the proper procedure, at least when there is no other evidence the child is an Indian child, is to affirm the termination on the condition that the proper notification be provided. Only if it turns out the child is an Indian child and the tribe wants to intervene must the termination be reversed. Otherwise the termination stands.

IV. THE RIGHTS OF THE PARTIES.

Under the Federal and Iowa Acts, an indigent parent or Indian custodian is entitled to court appointed counsel for any proceeding involving placement, involuntary removal, or termination of parental rights. The Federal Act allows the court to appoint an attorney for the Indian child "in its discretion." The Iowa Act also specifically requires the appointment of counsel for the child. Both Acts also allow any party to examine any documents or reports that were filed with the court upon which a decision may be based.

The Iowa Supreme Court was faced with the issue of whether or not a tribe can represent itself without the benefit of a licensed attorney in ICWA proceedings in *In Re N.N.E.*, 752 N.W. 2d 1 (Iowa 2008). There, the Court held that the tribe should be accorded that right:

> Whether a tribe may represent itself in court is an issue of first impression. For the reasons that follow, we believe a tribe should be permitted to represent itself in ICWA proceedings. We need not determine whether such a right should extend to other types of cases. . . We must also be sensitive to the economic hardship that would occur if we were to require tribes to hire lawyers in ICWA matters. *(citation omitted.)* Many tribes lack the resources for legal representation. Therefore, we hold a non-lawyer tribal member may represent the tribe in ICWA proceedings as long as the representative can demonstrate he or she is authorized to speak on behalf of the tribe.

V. **TRANSFER OF PROCEEDINGS**.

Both the Federal and Iowa Acts provide that the Indian tribe has exclusive jurisdiction over child custody proceedings involving an Indian child that resides or is domiciled on a reservation. However, there are transfer rights that apply to Indian children who do not reside or are not domiciled on a reservation. Unless one of the Indian child's parents objects, the court must transfer the proceedings to the jurisdiction of the tribe upon the petition of either of the child's

parents, the child's Indian custodian, or the child's tribe. Both the Federal Act and the Iowa Act make the transfer provisions applicable to both voluntary and involuntary proceedings.

Under the Federal Act, the transfer does not occur if a parent objects. Therefore, both parents have "veto power" over a transfer under the Federal Act and do not lose this right, even to veto transfer based upon misconduct. Unlike the Federal Act, the Iowa Act provides that an objection to transfer by a parent is to be rejected by the court if the objection is inconsistent with the purposes of the Act. Therefore, a parent does not have an absolute right to veto transfer under the Iowa Act. Also, both Acts allow the tribe to decline transfer of the proceeding, which, in effect, gives the tribe absolute veto power on the issue.

Under the Federal Act, the transfer is to occur "in the absence of good cause to the contrary." The Federal Act itself does not provide a definition of what would constitute "good cause" to decline transfer, but the BIA Guidelines do contain a non-inclusive list of five reasons that may constitute good cause: (1) the tribe does not maintain a tribal court; (2) the proceeding was already at an advanced stage when the transfer petition was filed; (3) the child is over twelve years of age and objects to the petition to transfer; (4) presenting the necessary evidence in tribal court will cause the parties undue hardship; and (5) the parents are not available, the child is at least five years old, and the child has had little or no contact with the tribe or its members. The BIA Guidelines specifically prohibit a state court from considering socioeconomic conditions or the perceived adequacy of the tribal or BIA social services or judicial systems in making a good cause determination to deny transfer. The Iowa courts, while not bound by the BIA Guidelines, apply them when determining the issue of good cause for denial of transfer of jurisdiction. *In re* J.W., 528 N.W.2d 657, 660 (Iowa Ct. App. 1995). The United States Supreme Court has ruled that bonding between an Indian child and non-Indian custodians is not a sufficient reason to avoid application of the Federal Act and does not outweigh the tribe's interest in making the custodial decision. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53–54 (1989).

The Iowa Act statutorily limits good cause for refusal to transfer to four reasons: (1) the tribal court declines the transfer; (2) a lack of subject matter jurisdiction by the tribal court under tribal or federal law; (3) circumstances exist where the necessary evidence cannot be presented in tribal court without imposing undue hardship either to the parties or the witnesses *and* the tribal court cannot mitigate the hardship by any other means, such as hearing testimony by remote communication; and (4) an objection by a parent is entered. Therefore, the Iowa Act specifically excludes from consideration, on the issue of good cause for denial of transfer of jurisdiction, the advanced stage of the proceedings when the transfer petition was filed and the objection of a child older than twelve years of age. Also absent is any provision for a finding of good cause for denial based on a child over five years of age having had little or no contact with the tribe. However, these deviations from the federal statute may make the Iowa law unconstitutional. In *In re: J.L., L.R., and S.G.* (Iowa Court of Appeals, November 25, 2009), the Iowa Court of

Appeals reversed the trial court's refusal to allow the children to object to an ICWA transfer pursuant to Iowa Code 232B.5 finding that the relevant provision of the Iowa ICWA was unconstitutional. The Court first examined the ability of states to expand on the protections provided in the federal ICWA:

> States are permitted to expand on the protections established pursuant to ICWA. *(citations omitted*). However, states cannot provide additional rights to tribes at the expense of the parents' or children's rights.

The Iowa Court of Appeals held that the provisions denying children the right to object to transfer violates the procedural due process rights of the children:

> A child's liberty interest in familial association is protected by the Due Process Clause and the State may only interfere with this liberty interest after providing the children due process of law . . . The children are parties to the transfer proceedings and have a vital interest in the proceedings. . . The statute, by not including the children as parties able to make an objection, violates their procedural due process rights. Therefore, we find Iowa Code section 232B.5(10) unconstitutional on procedural due process grounds.

The Iowa Court of Appeals also held that the provisions denying children the right to object to transfer violates the substantive due process rights of the children:

> "Assuming survival of the tribe is a compelling state interest," we must determine whether the Iowa ICWA definition of good cause is narrowly tailored. *(citation omitted*) We find that it is not. Iowa Code section 232B.5 completely prohibits the children subject to the proceeding from asserting their rights. In this case, it prohibited the children from raising an argument based upon their best interests, such as their preference to remain with siblings or their physical or psychological safety. Furthermore, in any case the court cannot consider the children's particularized circumstances. Because the narrow good cause definition prevents the children from asserting any argument, the statute places the rights of the tribe above the rights of an Indian child. Therefore, we find that the narrow definition of good cause prohibiting the children from objecting to the motion to transfer based upon their best interests and introducing evidence of their best interests violates their substantive due process rights.

In *In re N.V.*, 744 N.W.2d 634 (Iowa 2008), the Iowa Supreme Court held that there is no timing requirement for the filing of a motion to transfer the case to the tribal courts under the Iowa ICWA:

> Section 232B.5(10) mandates that a court *shall* transfer the proceeding to a tribal court upon a petition from the persons listed in the statute. Iowa Code § 232B.5(10). While the statute does not directly speak to the timing of when the transfer can or should be made, the statute does include the language "upon the petition," indicating the transfer should be made directly after an appropriate party requests the transfer. This language makes it clear that section 232B.5(10) does not contain any limitation on the time in which a request to transfer must be filed. . . Consequently, we hold the plain language of the transfer sections of the Iowa ICWA do not allow the court to deny a request to transfer a case to the tribal court based on the timing of the request. . . When the legislature adopted section 232B.5(13)(*c*), it made a choice to adopt the undue hardship provision of the Bureau of Indian Affairs' guidelines, but not the provision dealing with the timeliness of a transfer request. This choice by the legislature confirms it did not intend to place a time limit on a parent's request to transfer a case to a tribal court.

The Court also refused to impose a deadline under a theory of estoppel:

> The doctrine of estoppel cannot be used to trump the clear statutory right under the Iowa ICWA that allows a party to transfer a case to a tribal court without a time limit. To hold otherwise would not only insert a time limit for a person to request a transfer that is not contained in the transfer statutes, but would also be inconsistent with the purpose of the act.

Finally, the Court held that a court cannot deny transfer of a case under Iowa ICWA because it is not in the best interest of the children:

> Finally, the State argues the district court should have denied the transfer request because it was not in the best interest of the children. This argument fails for two reasons. First, the transfer statutes do not allow a best-interest-of-the-child exception to deny a transfer request made in accordance with the Iowa ICWA. Second, the Iowa ICWA does not use the traditional definition of "the best interest of the child" as used in custody cases involving non-Indian children.

VI. INTERVENTION.

Both the Federal and the Iowa Acts give an Indian child's tribe and Indian custodian the absolute right to intervene at any point in the foster care placement or termination of parental rights

proceeding. Under the Federal Act, this right to intervention even extends to adoptive placement proceedings, which are final dispositions of involuntary termination proceedings. *In re M.E.M.*, 725 P.2d 212, 213 (Mont. 1986). The BIA Guidelines are silent on the procedure for intervention. However, at least one court has held that the Federal Act preempts state statutes requiring groups and associations to be represented by an attorney when a tribe intervenes in a child custody proceeding. *In re Shuey*, 850 P.2d 378, 381 (Or. Ct. App. 1993).

VII. **EVIDENTIARY REQUIREMENTS**.

There are three areas of evidentiary requirements that are somewhat unique to the ICWA involuntary proceedings: (1) the standard of proof; (2) the requirement of expert witnesses; and (3) the requirement of active efforts. One of the reasons for different evidentiary rules between the ICWA proceedings and other juvenile proceedings is the difference in the focus. The definition of "best interest of a child" under an Iowa ICWA proceeding includes compliance with the Federal Act and making a decision "that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community." To order foster care placement of an Indian child, the court must make a determination, supported by clear and convincing evidence and the testimony of expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child. To order a termination of parental rights of an Indian child, the court must make a determination, supported by evidence beyond a reasonable doubt and the testimony of expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child.

The determination of what constitutes "qualified expert witnesses" for ICWA purposes differs from other types of cases. While both the Federal and the Iowa Acts require testimony of "qualified expert witness*es*," an unpublished Iowa Court of Appeals decision ruled that neither Act requires "that the State present testimony of more than one qualified expert witness." The Federal Act does not contain a definition of the phrase "qualified expert witnesses," and, while the BIA Guidelines identify three types of expert witnesses under the Federal Act, the Iowa Court of Appeals previously stated that it is not bound by the Guidelines. *In re S.M.*, 508 N.W.2d 732, 734 (Iowa Ct. App. 1993). The Iowa Act provides specific language defining "qualified expert witnesses," as including, without limitation, "a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder." The Iowa Act further requires that the expert witness have "specific knowledge of the child's Indian tribe." It also provides a list of qualifying persons in "descending order of preference." The order of preference is as follows:

a. A member of the child's Indian tribe who is recognized by the child's tribal community as knowledgeable regarding tribal customs as they pertain to family organization or child-rearing practices.
b. A member of another tribe who is formally recognized by the Indian child's tribe as having the knowledge to be a qualified expert witness.
c. A layperson having substantial experience in the delivery of child and family services to Indians, and substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.
d. A professional person having substantial education and experience in the person's professional specialty and substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.
e. A professional person having substantial education and experience in the person's professional specialty and having extensive knowledge of the customs, traditions, and values of the Indian child's tribe as the customs, traditions, and values pertain to family organization and child-rearing practices.

Before accepting testimony of the least preferred type of expert, the court must make and document efforts to procure an expert higher in the preferential order, including, but not limited to, contacting the tribe's governing body, the ICWA office, and the social service office. The Iowa Act not only delineates the requirements for a qualified expert witness, but also specifies what testimony is required of that expert in involuntary cases. The court requires the expert witness to "testify regarding that tribe's family organization and child-rearing practices, and regarding whether the tribe's culture, customs, and laws would support the placement of the child in foster care or the termination of parental rights on the grounds" required for such action under the Iowa Act.

Both the Federal and the Iowa Acts require that evidence establish "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have" failed before an involuntary foster care placement or an involuntary termination of parental rights can be ordered. Such efforts must reflect "the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe" and "shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregivers." The Iowa Act also goes much further than the Federal Act by defining "active efforts." The Iowa Act states the following:

> The court shall not order the placement or termination, unless the evidence of active efforts shows there has been a vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts as defined in sections 232.57 and 232.102. Reasonable efforts shall not be construed to be active efforts.

The Iowa Act continues by listing six different nonexclusive examples of active efforts, including identifying and providing information to the family of community resources available for "housing, financial, and transportation assistance and actively assisting the family in accessing those community resources."

The Iowa Court of Appeals has issued one unpublished opinion on the issue of active efforts since the passage of the Iowa Act. In the decision, the court held that "unlike reasonable efforts where the juvenile court is given certain discretion to determine what services are appropriate, section 232B.5(19) provides there are specific things that active efforts shall include." The court held that the State has the burden of proof on this issue in order to be successful in terminating parental rights and, as such, the issue is not waived even if it was never raised until the termination hearing. The court criticized the State for failing to address each requirement and showing how it was met and held that it was not sufficient to show "that the mother did not ask for services, was difficult to find, and did not make sufficient efforts in her own behalf." In reversing the lower court's termination order, the Iowa Court of Appeals stated the following:

> We also recognize that the requirements of the Act are strict, and compliance may be difficult and costly. However, the statute is quite clear that the legislature has required substantial state resources be directed to preserve Indian families. We are governed by the statutes in this case, and if they are to be changed or modified, it must be done by the legislature, not the courts.

Only one reported decision has dealt with the conflict between the Indian Child Welfare Act and the Adoption and Safe Families Act (ASFA). *People ex rel. J.S.B.*, 691 N.W.2d 611, 617 (S.D. 2005). That decision, by the South Dakota Supreme Court, directly addressed the issue of whether or not ICWA takes precedence over the ASFA. Under the ASFA, reasonable efforts can be waived under certain aggravated circumstances. In this case, "the trial court ruled that ASFA 'preempts' the requirements of ICWA," allowing "active efforts" to be waived under the aggravated circumstances set forth in the ASFA. The South Dakota Supreme Court disagreed, stating that "we do not think Congress intended that ASFA's 'aggravated circumstances' should undo the State's burden of providing 'active efforts' under ICWA."

VIII. PLACEMENT PREFERENCES.

Both the Federal and the Iowa Acts provide placement preferences for Indian children for adoptive, preadoptive, and foster care placements that are both voluntary and involuntary. Under both Acts, the "prevailing social and cultural standards" of the applicable Indian community are to be applied in qualifying any placement. Also, both Acts allow a child's tribe to establish a

different order of preference for placement that the court must follow. The United States Supreme Court stated that the placement preferences are the most important substantive requirement of the Act placed on state courts. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36–37 (1989). The Federal Act contains a good cause exception to the application of the placement preferences. The BIA Guidelines define the following factors that should be considered when making a determination of good cause to depart from the statutory placement preference order:

> (i) The request of the biological parents or the child when the child is of sufficient age.
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of an [sic] qualified expert witness.
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

In *In re A.E.*, 572 N.W.2d 579 (Iowa 1997), the Iowa Supreme Court addressed whether the Federal ICWA's good cause exception "allow[s] trial courts the discretion to consider the best interests of the child as one of the factors in determining whether the exception applies." After acknowledging a split among state courts, the Iowa Supreme Court interpreted the Federal Act as allowing the best interests of the child to be one of the many factors a court may consider.

While both the Federal and the Iowa Acts provide that the placement preferences of Indian children and their parents be considered, there is a difference as to the effect of a consenting parent's desire for anonymity. The Federal Act allows the weighing of that factor when making a placement decision. The Iowa Act prohibits using this request for anonymity to be a basis for avoiding the placement preference "[u]nless there is clear and convincing evidence that placement within the order of preference . . . would be harmful to the Indian child." The Iowa Act does not include a good cause exception for following the placement preferences, but does say that "[t]o the greatest possible extent, a placement made in accordance with [the preferences] shall be made in the best interest of the child." It should be noted, however, that the terms "best interest of the child" take on additional meaning under the ICWA. The Federal Act clearly establishes that the purpose of the Act is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." The Iowa Act actually defines "best interest of the child" in a manner that uses practices in accordance with both the Federal and the Iowa ICWA Acts and in a manner that is designed to meet the goals and purposes of the two Acts.

The placement preferences for adoptions under the Federal Act are "with (1) a member of the child's extended family; (2) other members of the child's extended family; or (3) other Indian families." The Iowa Act includes the three placement preferences stated in the Federal Act, but

includes two more: for "[a] non-Indian family approved by the Indian child's tribe" and for "[a] non- Indian family that is committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe." The Iowa Act also provides that the placement preferences itemized in the statute are "in descending priority order."

For nonpermanent placements (such as removal, foster care, or preadoptive placements), both the Federal and the Iowa Acts require that, to the extent the child's special needs can be met, the placement must be "in the least restrictive setting" that approximates a family setting and is within a reasonable proximity of the child's home. The placement preferences for these nonpermanent placements under the Federal Act are with: (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Once again, the Iowa Act includes the placement alternatives in the Federal Act, but also includes two more: (1) "[a] non-Indian child foster care agency approved by the child's tribe"; and (2) "[a] non-Indian family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe." Again, the Iowa Act provides that the placement preferences are listed "in descending priority order."

IX. CONCLUSION.

As stated at the beginning of this Article, there are substantial similarities and differences between the Federal and Iowa ICWA statutes. Although many of the additions to the Iowa Act are merely a codification of the BIA Guidelines, it is important to remember that, in the past, the Iowa courts have ruled that the BIA Guidelines were not controlling and that the courts were not bound by them. However, when those guidelines are codified in the state statute, they become binding on the court and strict compliance is required. *In re J.W.*, 528 N.W.2d 657, 660 (Iowa Ct. App. 1995).